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80-1293

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980
No. _____

JOHN L. SCHULZ PLUMBING & HEATING,
Petitioner,

v.

ROBERT P. PRATTE, ET AL.,

PETITION FOR A WRIT OF CERTIORARI FROM THE SUPREME COURT OF CALIFORNIA

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QUESTIONS PRESENTED

This action is based on petitioner's foreclosure of a mechanic's lien as the result of a construction project by defendant as the owner-contractor. The trial court found for defendant on his cross-complaint for damages in a net amount over that allowed as damages to petitioner on his foreclosure action.

The questions thereby arising are:

1. Whether a state appellate court can make a decision that is contrary to a published decision of that state's highest court.

2. Whether the decision of the trial court was based on such a lack of substantial evidence as to justify the reversal of the decision for denial of due process as guaranteed by the United States Constitution.

3. Whether the failure of the trial court to grant petitioner his requested continuances constituted a denial of his rights to due process of law guaranteed by the United States Constitution.

CERTIFICATION AS TO INTERESTED PARTIES

The undersigned, counsel of record for Petitioner John L. Schulz listed below, certifies that the following listed parties have an interest in the outcome of this case. These representations are made to enable justices of the Court to evaluate possible disqualifications or recusal.

There are no other interested parties other than those named in the caption of this case and their attorneys of record.

However, also included are Robert P. Pratte, dba Snow Summit Townhouse Estates and Summit Developement Co.

by_____

Sylvia L. Paoli

Attorney for Petitioner

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PETITION FOR A WRIT OF CERTIORARI FROM THE SUPREME COURT OF CALIFORNIA

The petitioner, JOHN L. SCHULZ PLUMBING & HEATING, prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals of the State of California rendered in these proceedings on August 19, 1980, with a hearing denied by the Supreme Court of California on October 29, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of California, Fourth Appellate District, Division Two, not

certified for publication, appears at Appendix A, **infra,** pp. 14-25. The Appellate Court affirmed the judgment of the Superior Court of San Bernardino County.

JURISDICTION

The order of the Supreme Court of the State of California, denying a hearing on the decision of the Court of Appeals of the State of California, was filed on October 29, 1980. This petition for certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment Fourteen, Section One:

> "... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the United States, Article III, Section Two:

> "The judicial power shall extend to all cases, in law and equity, arising under this constitution (and) the laws of the United States."

STATEMENT OF FACTS

A total of three contracts were signed by and between petitioner, JOHN L. SCHULZ PLUMBING & HEATING and defendant SUMMIT DEVELOPMENT COMPANY and ROBERT P. PRATTE, to wit, a plumbing contract for $125,000.00, a heating contract for $55,000.00, and a ventilation contract for $3,000.00, all work to be performed in an 85-unit condominium project in Big Bear, California, know as Snow Summit Townhouse Estates.

Petitioner claimed modifications were made as to the material and equipment required in the original plans and specifications, and that subsequent oral agreements were made for additional work not contained in, covered by or contemplated in the written contracts.

Defendant maintained that all work performed by petitioner was within the contract provisions, and that no extra work was contracted for with the exception of three signed change orders.

Petitioner moved for a continuance of the action on two different occasions, both of which were denied. In petitioner's first motion for continuance, counsel's Declaration stated that said counsel for petitioner had just been substituted into the case, and found that no preparation of any kind had been done; with substantial amounts of discovery necessary to properly prepare petitioner's case for trial, there was not sufficient time in which to conduct such discovery with the trial setting conference less than a

month from the time petitioner retained his new counsel. No papers in opposition to the continuance were filed by defendant, and no appearance at the hearing of peti tioner's motion was made on behalf of defendant. The court denied petitioner's motion for continuance on the grounds of "court policy", even in the face of "good cause" being shown and no opposition being presented. The matter was set for trial, and petitioner proceeded with the greatest diligence to attempt to prepare his case. The week prior to the trial date set, petitioner again moved for a continuance, on the grounds that, in spite of the greatest diligence in attempting to complete his discovery and other preparation necessary for trial, it had simply not been possible in the time allotted, especially in view of the seeming intentional obstruction of defendant, necessitating numerous motions to the court to conduct even the most rudimentary discovery. Petitioner's motion was again denied, and the case went to trial, with a net award being made against petitioner.

REASONS FOR GRANTING THE WRIT

The California Supreme Court, in **Earhart v. William Low Company,** 25 Cal. 3d 503, 600 P.2d 1344, 158 Cal. Rptr. 887 (1979), after discussing the doctrines of part performance, estoppel and promissory estoppel, stated that "(i)n view of the equitable considerations lying at the foundation of these several docctrines, and reflected in

the opinion in **Coleman**[1] we conclude that compensation for a party's performance should be paid by the person whose request induced the performance." Thus the court effectively did away with the prior requirement that for recovery under a theory of quantum meruit there must be benefit to the defendant, basing the entire theory instead upon how the plaintiff came to do the work.

In the within case, despite testimony by defendant's own witnesses, including his various supervisors on the project, that petitioner had been requested to do certain extra work involving changes in the initial plans and specifications or additions there, which testimony was uncontroverted as to many items, and that petitioner had in fact done the requested work and indicated he expected to be paid for it, the court refused to allow petitioner recovery for such work. The decision effectively controverted the body of state law on quantum meruit recovery. [2] Thus it is urged that this Court grant a hearing on the matter where it seems that the standard of substantial evidence to support a position has been misapprehended or grossly misapplied by the court below, presenting substantial due process questions. **Mobile Oil Corp v. FPC**, 417 U.S. 283, 310, 94 S.Ct. 2328 (1974); **Universal**

1) Coleman Engineering Co. v. North American Aviation, Inc., 65 Cal. 2d 396 (1966).

2) **Koosian v. American National Ins. Co.**, 254 Cal. App. 2d 647, 62 Cal. Rptr. 225, 2 A.L.R. 3d 620 (1967); **1st Olympic Corp. v. Hawryluk**, 185 Cal. App. 2d 832, 841, 8 Cal. Rptr. 728 (1960); 1 Witkin (8th ed.) **Summary of California Law**, "Contracts", § § 49, 50, 51, p. 60 et seq.

Camera Corp. v. NLRB, 340 U.S. 474, 491; **Thompson v. City of Louisville,** 362 U.S. 199, 80 S.Ct. 624 (1960).

The trial transcript of the case shows a number of so-called "extras" that were in dispute, being claimed as non-contract additional work by petitioner herein, and claimed as covered under the existing written contracts by defendant. However, on the numerous items referred to herein, there was no contradiction. Defendant and his witnesses testified to the work being done and that petitioner performed such work at their request, with defendant obtaining and keeping the benefit thereof, and petitioner expecting to be paid therefor. It is on these items, that have been set forth with specific reeferences thereto in petitioner's briefs to the state appellate courts, that those courts have ignored the California law on the subject, to the severe damage of petitioner herein, judgment having been rendered against him in a total sum of $75,419.24 plus interest (including attorney fee awards). It is contended that a proper application of the law to the facts of the case would have resulted in no monetary award against petitioner, but an award of money damages in favor of petitioner and against defendant. The failure of the trial court, and the appellate courts subsequently, to apply the law of the highest court of the state, has resulted in the failure of petitioner to receive the due process guaranteed him in all actions at law and equity by the Constitution of this land. As a result, petitioner will suffer a severe loss of his property in an execution on the

judgment rendered for defendant, bringing him squarely within the protection of this court.

Going hand in hand with the law of quantum meruit recovery as set forth in **Earhart,** infra, is petitioner's right to recover the fair value of materials and services rendered to defendant on the oral contracts made by and between petitioner and defendant's agents. Part performance has been completed on those oral agreements by the completion of petitioner of the work and services requested in addition to those required by the original contracts. Under the Constitutional prohibition against impairment of the obligation of contracts petitioner has a right to the court's determination of the value of his performance of those oral agreements.[3)]

The Court of Appeals attempted to uphold a waiver by petitioner of his quantum meruit claims for non-contract work performed pursuant to subsequent written contracts. (A. "A", p. 7.) However, as petitioner pointed out in his petition for hearing to the Supreme Court of California, petitioner could not cite portions of the record opposing substantial numbers of the work and services claimed as "extras" because there simply was no such testimony to cite to. Thus the trial court did not rule with its basis being the determination that the sufficiency of the evidence was in defendant's favor as to all of the claimed

3) **Home Building & Loan Ass'n v. Blaisdell,** 54 S.Ct. 231 (1934), holding the obligation of contract is the law which binds parties to perform their agreement.

"extras", but simply ignored all the work done at the request of defendant's agents except those for which there were written change orders — exactly three. Petitioner cited numerous instances of testimony by defendant's own employees and supervisors as to changes made in the plans, and how long it would have taken, in their estimation, for defendant to do the work involved. There was no testimony that such changes were NOT done. Plaintiff testified to having done the work, as well. However, there were no written change orders for many such changes and the appellate court's opinion shows a mistake of fact as to the lack of contrary evidence. It further shows a mistake of law as to the law of quantum meruit recoveries as set forth by the highest court of the state.

FAILURE OF THE TRIAL COURT TO GRANT PETITIONER'S REQUEST FOR CONTINUANCE

Petitioner's counsel first moved for continuance of the trial-setting conference after being retained approximately one month before that date and ascertaining, upon receiving possession of petitioner's file, that absolutely no preparation had been made whatsoever in the case, no discovery had been done and nothing more than a few notes on the facts of the case were in the file. That motion was denied as a "matter of policy" by the Court, even though there was no opposition by defendants, who did not even appear at the hearing. Petitioner thereafter set forth on a course of diligently pursuing necessary dis-

covery, to be met by one obstruction after another on the part of defendant.

Defendant first refused to be deposed on the date noticed by petitioner. When the deposition was finally held, defendant did not produce the documents which he had been noticed to produce, forcing petitioner into court on a motion to compel the production. Then when served with Requests for Admissions and Interrogatories, defendant filed a Motion for a Protective Order and Sanctions, causing yet another 150 mile trip to the court and more paperwork on matters not productive of the necessary progress towards trial. When defendant later agreed to sending of a neutral third-party onto the construction premises to inspect and detail the exact location of the works completed by petitioner, to be compared with the plans and specifications, defendant managed, by actions and conduct, to cause the inspection not to be made, forcing petitioner to file yet another motion with the court.

Thus, with very little time in which to completely prepare a three-year-old case for trial from the very beginning, petitioner's counsel spent half of that preparation time in law and motion matters made necessary by defendant's total lack of cooperation. The Fourth Appellate Court of California, in **County of San Bernardino v. Doria Mining & Engineering Corp.**, 72 Cal. App. 3d 776, 781, 140 Cal.Rptr. 383 (1977) has indicated that, while "unnecessary" continuances should be avoided, there are some that must be granted for good

cause. Petitioner, in his Opening Brief to that Court of Appeal, showed some eleven different actions that would and should have been taken had there been adequate time before trial to do so, and petitioner contends that such actions constitute the "good cause" referred to by that same court in **Doria Mining** on page 781. This court, in **Franklin v. South Carolina,** 218 U.S. 161, 30 S.Ct. 640 (1910) has addressed the same basic issue, indicating that a defendant must be given adequate time to prepare a defense, and that if he is not, appellate relief is justified under the Constitution. While Petitioner herein was the initial plaintiff in the trial court, he was also a cross-defendant by virtue of defendant's cross-complaint, and so had not only his own case in chief to prepare, but also his defense.

While petitioner concedes the wisdom in avoiding "unnecessary" continuances, and the court requires "good cause" to be shown for granting same, petitioner contends that the court needs to define the parameters of those requirements with an end in view of solving some of the country-wide court congestion, or "current law explosion" referred to by the Fourth Appellate Court in **Doria Mining.**

The Court in **Cohen v. Herbert,** 186 Cal. App. 2d 488, 494, 8 Cal. Rptr. 922 (1960), held that the denial of a continuance where counsel had had insufficient time to prepare the case for trial was an abuse of discretion which

amounted to the denial to petitioner of his Constitutional right to a fair hearing, a point raised by petitioner in his state appellate court briefs.

CONCLUSION

The United States Supreme Court may, by certiorari, review any final judgment of the Courts of Appeal or the highest court of a state. **Call v. Town of Afton,** 278 P.2d 270 (1954). Further, the very question of whether claims are based on a federal right or are merely of local concern is a federal question, on which the United States Supreme Court has final authority. **Angel v. Bullington,** 67 S. Ct. 657, 330 U.S. 183 (1947). For all of the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated January 27, 1981.

PAOLI & PAOLI

By _____

SYLVIA L. PAOLI

Counsel for Petitioner

CERTIFICATION AS TO OTHER CASES BEFORE THE UNITED STATES SUPREME COURT

There are no other actions concerning this case pending before the United States Supreme Court for consideration at this time.

by_____

Sylvia L. Paoli

Attorney for Petitioner

appendix "A"

COURT OF APPEAL, FOURTH DISTRICT
SECOND DIVISION
STATE OF CALIFORNIA

JOHN L. SCHULZ, PLUMBING & HEATING,	)	
Plaintiff and Appellant,	)	**4th Civil 21110**
V.	)	**(Super.Ct.No. 162534)**
ROBERT P. PRATTE,	)	
Defendant and Respondent.	)	**O P I N I O N**

APPEAL from a judgment of the Superior Court of San Bernardino County. Rex W. Cranner, Judge. Judgment affirmed.

Paoli & Paoli and Sylvia L. Paoli for Plaintiff and Appellant.

Williams, Williams & Furukawa and Ernest George Williams for Defendant and Respondent.

Plaintiff brought an action to foreclose a mechanic's lien for labor and materials furnished for the installation of plumbing, heating and ventilation systems

for an 85 unit condominium project being constructed by defendant Summit Development Company, a corporation. The complaint sought recovery of the claimed unpaid balance on the contracts and sums allegedly due for extras. Defendant cross-complained against plaintiff for damages for breaches of the contracts and for attorneys fees and interest. Following a nonjury trial, the court found in favor of defendant and against plaintiff and entered judgment that plaintiff take nothing on the complaint and that defendant have judgment against plaintiff on the cross-complaint for $60,419.24. Plaintiff appeals from the judgment.

The trial judge prepared a detailed memorandum of intended decision setting forth his analysis of the evidence and made findings of fact and conclusions of law in accordance with the decision. The pertinent facts as gleaned from the findings and intended decision may be summarized as follows:[1)]

On December 1, 1972, the parties entered into two written contracts: One called for plaintiff to furnish all labor and materials for the installation of the plumbing in the condominium project in accordance with plans and specifications for $125,000; the other called for plaintiff to

1) Plaintiff fails to set forth a summary of the material facts as required by the rules on appeal. Moreover, he ignores the basic rule of appellate review that the evidence must be viewed in the light most favorable to the party prevailing below. Plaintiff's purported statement of facts consists merely of a summary of a portion of the testimony and evidence favorable to him.

furnish all labor and materials for the installation of heating and ventilation systems for the project in accordance with plans and specifications for $55,000.

The contracts required plaintiff to perform the work in accordance with a construction schedule to be supplied by defendant. Defendant timely furnished plaintiff the construction schedule and all revisions to it. Under the schedule, the completion date for the plumbing was December 18, 1973. When it became evident that plaintiff would not be able to meet the construction schedule, defendant, in accordance with the terms of the contract, notified plaintiff that defendant would employ extra help to perform the work in default and did so. Also, because of defective workmanship, defendant had to employ others to remedy the defects. Furthermore, as a result of plaintiff's failure to perform in accordance with the construction schedule, the entire project was delayed resulting in damages to defendant in the form of additional interest on the construction loan and salaries for the job superintendents.

Defendant paid plaintiff $172,840.11 on account of work performed and materials furnished under the two contracts. Plaintiff claimed $53,281.31 for extra work but the court found that the reasonable value of all extras for which defendant was required to compensate plaintiff was $3,384.32. The court found that the reasonable expense incurred by defendant to complete the work contracted to be performed by plaintiff was $13,280.86 and that the

reasonable expenditure to correct the defective work was $5,798.69.

The court found that the plumbing which was to have been completed on December 18, 1973, was not completed for inspection until April 26, 1974; that although part of the delay was attributable to other subcontractors, the principal cause was plaintiff's failure to perform his work in a timely and workmanlike manner; that as a result of the delay, defendant was required to pay additional construction loan interest in the sum of $55,622.43 and additional salaries for job superintendents in the sum of $7,750; and that plaintiff was responsible for one-half of the damages for delay or $31,686.22. Accordingly, the court found that defendant sustained damages in the total sum of $50,765.77; that plaintiff was entitled to credit in the total sum of $183,266.20 and that defendant's net damage was $40,330.68.

The contract provided that defendant was entitled to 10 percent interest on expenditures to complete the contracts and to cure defective workmanship, interest to commence from the date of the expenditures and to continue until paid. The court awarded interest in the sum of $8,088.56 computed as follows: 10 percent on $13,280.86 (expenses of completing the contracts) from June 1, 1974, to October 31, 1978, and 10 percent on $5,798.69 (expenses of curing the defects) from December 31, 1974, to October 31, 1978. The court also awarded defendant reasonable attorney fees in the sum of $12,000.

The total award in favor of defendant and against plaintiff was $60,419.24.

Plaintiff's main contention on appeal is that the court erred in failing to award him compensation on a quantum meruit basis for the claimed extras. Plaintiff also complains that the court abused its discretion in denying requested continuances and erred in certain evidentiary rulings. Finally, plaintiff argues that the damages were "excessive" because the court exceeded the 90-day rule in rendering its decision causing interest charges to accrue during the period of the delay. The contentions lack merit and the judgement should be affirmed.

I

The contention that plaintiff should have been credited with the amount of the claimed extras on a quantum meruit theory is nothing more than an attack upon the sufficiency of the evidence to support the court's finding that the reasonable value of the extras requested by defendant did not exceed the sum of $3,384.32.

Plaintiff argues that although the contract provided for payment for extras only where they have been ordered in writing, he was nevertheless entitled to recover on a quantum meruit theory. He cites cases permitting recovery for the reasonable value of extra work furnished at the request of the owner even though the request was oral and the contract made the owner chargeable only for

extras ordered in writing. **(1st Olympic Corp. v. Hawryluk,** 185 Cal.App. 2d 832, 841, and cases there cited.)

In the case at bench the evidence was uncontradicted that, except for work amounting to $3,384.32, the claimed extras were never ordered in writing. The evidence was conflicting whether the claimed extras were in fact extras or not provided for by the contract and also whether they had been requested by defendant. The trial court resolved the conflicts in favor of defendant. As a reviewing court it is not our function to reweigh the evidence or reassess the credibility of witnesses.

Although a trial judge's memorandum opinion cannot be used to impeach, modify or add to his findings, it may be considered for the purpose of discovering the process by which the judge arrived at his conclusion and may be referred to as an aid to the interpretation of the findings. **(Union Sugar Co. v. Hollister Estate Co.,** 3 Cal.2d 740, 750; **Wechsler v. Capitol Trailer Sales,** 220 Cal.App.2d 252, 262; **1st Olympic Corp. v. Hawryluk, supra,** 185 Cal.App.2d 832, 838.) In his memorandum opinion, the trial judge determined that many of the claimed extras were for work which plaintiff was required to perform without extra cost to the owner and that plaintiff presented little or no evidence to corroborate his claim that the work and labor for which he sought extra compensation were in fact furnished. The judge noted that the evidence showed that after defendant declined to

make further advances on the contracts after having paid all but about $6,000 on the contracts, plaintiff reacted with a "flurry" of claims for extra compensation and charged defendant with contract breaches and interference in plaintiff's performance of the contracts. It is quite evident that the judge determined that plaintiff's evidence on the claimed extras was not credible.

On the subject of the extras, plaintiff cites numerous Reporter's Transcript references, purportedly to testimony supporting plaintiff's theory of recovery, but does not set out the substance of the testimony. Furthermore, plaintiff cites only portions of the record favorable to him. A reviewing court must start with the presumption that the record contains evidence supporting every finding and the burden is on the appellant to demonstrate that there is no substantial evidence to support a challenged finding. One contending that the evidence does not support a finding must set forth in his brief all of the material evidence bearing upon the issue, favorable or unfavorable and not just evidence favorable to him and failure to so state the evidence shall be deemed a waiver of the claimed error. (**Foreman & Clark Corp. v. Fallon,** 3 Cal.3d 875, 881; **Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.,** 66 CAl.App.3d 101,152; 6 Witkin, Cal. Procedure (2d ed.) Appeal, § 425, pp 4391-4393, and cases there cited.) By ignoring the foregoing salutory rules, plaintiff has waived his attack on the sufficiency of the evidence to support the court's findings on extras.

1977.[2] On August 22, she filed a motion for continuance "so impeded plaintiff's discovery that it was impossible and plaintiff's counsel agreed. Plaintiff now contends that no liability for the claimed extras, an erroneous exclusion of decision was justified. There is a presumption that official

II

Plaintiff contends that the court abused its discretion in denying requests for continuances.

Plaintiff's present counsel (Sylvia Paoli) states that she was substituted in as attorney for plaintiff on August 2, 1977.[2] On August 22, she filed a motion for continuance of the trial setting conference scheduled for September 8 supported by her declaration that a continuance was necessary because of the lack of preparation by former counsel, the gravity of the case and the need for extensive discovery. The motion was denied and the case was set for trial for December 15. On November 21, plaintiff made another motion for continuance, noticed for December 5. The motion was made on the ground that defendant had "so impeded plaintiff's discovery that it was impossible for plaintiff to adequately prepare for trial." That motion was also denied.

The matter of continuance rests in the sound discretion of the trial court. **(County of San Bernardino v. Doria**

2) The record reveals that plaintiff's action was filed by the law firm of Fonte, Warren & Paoli of Buena Park. It is conceded that Mr. Paoli of that law firm is the husband and present law partner of Sylvia Paoli.

Mining & Engineering Corp., 72 Cal.App.3d 776.) Plaintiff has failed to demonstrate an abuse of discretion. This is an action to foreclose a mechanic's lien on defendant's property. The property had been clouded by the lien for over three years yet plaintiff failed to institute discovery until four months before trial.

In a related contention, plaintiff makes the startling assertion that the court abused its discretion by believing portions of "all witnesses' testimony while at the same time disbelieving other portions of the same witnesses' testimony." All we need say about this contention is that the cases cited by plaintiff do not even remotely support it.

Plaintiff's contention that the court failed to make findings "as to the status of the remaining claimed extras [other than those authorized in writing]" is without merit. A finding is sufficient even though it might have been more clearly phrased if the language is clear enough to convey what the court intended. **(1st Olympic Corp. v. Hawryluk, supra,** 185 Cal.App.2d 835, 839.) The court's findings read in light of the court's memorandum decision reveal that they were intended to cover all of the claimed extras.

III

Plaintiff complains of two evidentiary rulings.

During the direct testimony of plaintiff's wife, she testified that before the contracts were executed they

spoke to defendant's agent and that the agent said plaintiff should be able to do the contract for $125,000 by deleting the sheet metal work, the ventilation, by reducing 50 gallon water heaters to 40 gallons, and by not insulating the pipes. At that point, defense counsel made the observation (not an objection or motion to strike) that the testimony constituted an attempt to vary the terms of the written contract. The court commented that if the conversations were part of the negotiations leading to the execution of the contracts and were at variance with the contract documents, the conversations "would be barred." There being no motion to strike, the testimony remained on the record.

The second ruling was made during the testimony of plaintiff's wife concerning the reasonable value of the claimed extras. Defendant objected to her testimony that plaintiff's "overhead . . . is figured and comes out at $6." The objection was on the ground that the contract provided that compensation for extra work would be charged at subcontractor's direct costs for labor and material, plus 10 percent of such direct costs for overhead plus 10 percent of such direct costs as profits. The court sustained the objection on the ground that the contract was specific regarding the computation of the "overhead" and plaintiff's counsel agreed. Plaintiff now contends that the term "overhead" was ambiguous and that extrinsic evidence should have been received.

Plaintiff has failed to demonstrate that either ruling,

assuming them to be erroneous, resulted in a miscarriage of justice requiring reversal. Assuming that the first ruling precluded plaintiff from pursuing the subject of the conversation between plaintiff and defendant's agent and that this is what plaintiff is complaining about, plaintiff made no offer of proof in the court below as required by Evidence Code section 354 to show the substance, purpose and relevance of the excluded evidence. Absent such offer in the trial court, a judgment may not be reversed for a ruling excluding evidence. (Evid. Code § 354. [3]) The second ruling involved the exclusion of evidence pertaining to the method of calculating the amount of the claimed extras. Inasmuch as the court found no liability for the claimed extras, an erroneous exclusion of evidence relating to the method of computing the amounts could not have affected the outcome of the lawsuit.

3) Evidence Code section 354 provides:

"A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that:

"(a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, and offer of proof, or by any other means;

"(b) The rulings of the court made compliance with subdivision (a) futile; or

"(c) The evidence was sought by questions asked during cross-examination or recross-examination."

IV

Plaintiff contends that the damages awarded were excessive in that they provided for 10 percent interest on the amounts expended by defendant to complete the work and to correct defects in the work from the date of such expenditures to October 31, 1978. The argument is that since the case was submitted for decision on January 3, 1978, and should have been decided within 90 days, he should not have been charged with interest on the two items of damages beyond that 90-day period or April 3, 1978. He contends that the delay in rendering the decision resulted in additional interest charges of $1,112.

Plaintiff concedes that the matter was resubmitted on at least two occasions. In the absence of any showing to the contrary, we must presume that good cause existed for the resubmissions and that the delay in rendering the final decision was justified. There is a presumption that official duty has been regularly performed. (Evid. Code, § 664.)

Judgment is affirmed

Tamura

_____

Acting P.J.

We concur:

Kaufman _____

J.

Morris _____

J.

NOT TO BE PUBLISHED IN OFFICIAL RECORDS

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

OCT 29 1980

I have this day filed Order

HEARING DENIED

In re: 4 Civ. *No.* 21110

John Schultz Plumbing & Heating

vs.

Pratte

Respectfully,

Clerk

PROOF OF SERVICE

STATE OF CALIFORNIA) ss.
)
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the couty aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 612 N. Bush Street, Santa Ana, California 92701.

On January 27, 1981, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action, by placing a true copy in each of four envelopes, with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed as follows:

California Supreme Court
3580 Wilshire Blvd.
Room 213
Los Angeles, CA 90010

Clerk of the
Superior Court
County of San Bernardino
351 Arrowhead Ave.
San Bernardino, CA 92415

Clerk, Court of Appeal
4th Appellate District
303 West Third Street
San Bernardino, CA 92401

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I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on January 27, 1981, at Santa Ana, California.

JACK GALLAGHER